IN THE

Supreme Court of the United States

FILED

JAN 10 1974

October Term, 1973

No. 73-1091

PEACHTREE NEWS COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT EUGENE SMITH, Esq.
2005 - One Hundred Colony Square
Atlanta, Georgia 30361

GILBERT H. DEITCH, Esq.
2005 - One Hundred Colony Square
Atlanta, Georgia 30361

Counsel for Petitioner

Of Counsel:

NORMAN ABOOD, Esq.
2529 Gulf Life Tower
Jacksonville, Florida 32207

I N D E X

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
Reasons for Granting the Writ:-	
I. The provisions of Title 18, Section 1462, of the United States Code as written, and as applied herein, are repugnant to the First and Fifth Amendments to the Constitution of the United States, particularly in that the definition of what is determined to be obscene does not meet the strict tests laid down by this court in Miller v. California.	14
II. The publications involved in the case are not obscene in the constitutional sense and thus are protected expression under the First Amendment to the Constitution of the United States, as the same was applicable during the period of time covered by the alleged offense charged against the Petitioner.	28

Page

III. The various United States Supreme Court rulings on obscenity promulgated on June 21 and June 25, 1973, effecting a substantial decisional change in the application of constitutional principles, cannot be applied retroactively to petitioner in the case at bar for conduct occurring prior to those decisions, and, the application of the statute to said petitioner is void as ex post facto legislation by virtue of Article 1, Sections 9 and 10 of the United States Constitution. 36

IV. Certiorari should be granted because there is a substantial conflict between the circuits in connection with the application of Miller standards to conduct occurring prior to the date of that decision. 52

Conclusion 55

Certificate of Service 56

TABLE OF CITATIONS

Cases Page

Aday v. United States, 388 U.S. 477 (1967) 31
Alexander v. Commonwealth of Virginia, U.S. 37 L.Ed. 2d 993 (1973) 31,34
Austin v. Kentucky, 386 U.S. 767 (1967) 30
Avansino v. New York, 388 U.S. 446 (1967) 31
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 28
Bloss v. Dykema, 398 U.S. 278 (1970) 31
Bloss v. Michigan, 402 U.S. 928 (1971) 31

Breard v. Alexandria, 341 U.S. 622 (1961) 18
Bouie v. City of Columbia, ... 43,46,48,49
Books, Inc. v. U.S. 388 U.S. 488 (1967) 31
Burgin v. South Carolina, 404 U.S. 806 (1971) 28,31
Cain v. Commonwealth of Kentucky, 397 U.S. 319 (1970) 31
Calder v. Bull, 3 Dall. 386, 390 40
Carlos v. New York, 396 U.S. 119 (1969) 31
Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967) 31
Chance v. California, 389 U.S. 89 (1967) 31
Childs v. Oregon, 401 U.S. 1006 (1971) 31
Cobert v. New York 388 U.S. 443 (1967) 30
Conner v. City of Hammond, 389 U.S. 48 (1967) 31
Connolly v. General Construction Co., 269 U.S. 385, 391 39
Corinth Publications, Inc. v. Wesberry, 388 U.S. 448 (1967) 31,34
Cote v. U.S. 13 CrL 4094 15
Desist v. United States, 394 U.S. 244, 248 (1969) .....
England v. Board of Medical Examiners, 375 U.S. 411 28
Felton v. City of Pensacola, 390 U.S. 340 (1968) 31
Friedman v. New York, 388 U.S. 441 (1967) 30

Page

Gent v. Arkansas, 386 U.S. 767 (1967) 30
Ginzburg v. United States, 383 U.S.
463 (1966) 29- 33
Gosa v. Mayden, 13 CrL 3248 36
Great Northern R. Co. v. Sunburst Oil & Refining Co.
287 U.S. 358 29
Grove Press v. Gerstein, 378 U.S. 577
(1964) 34
Hartstein v. Missouri, 404 U.S. 988
(1971) 31
Henry v. State of Louisiana, 392 U.S.
655 (1968) 31
Hoyt, et al v. State of Minnesota,
399 U.S. 524 (1970) 31,34
I.M. Amusement Corp. v. Ohio,
389 U.S. 573 (1968) 31
Jacobellis v. Ohio, 378 U.S. 184 (1964) 30,32,33
Kaplan v. California, ___ U.S. ___
37 L. Ed.2d 492 15,26,48
Keney v. New York, 388 U.S. 440 (1967) 30
King v. Missouri, 107 U.S. 221, 135 40

Linkletter v. Walker, 381 U.S. 618 (1965) 36,41
Lore v. Fitzharris, 460 F.2d 382,
385 (9th Cir. 1972) 48
Mazes v. Ohio, 399 U.S. 453 (1967) 31,34
Memoirs v. Massachusetts, 383 U.S. 413
(1966) 20,29,31-34,50
Miller v. California, ___ U.S. ___
37 L.Ed. 2d 419 ..... 14,16 , 19,20,37,45
Mohney v. Indiana, 276 N.E.2d 517 (1973) 38,41
Palmer v. City of Euclid, 402 U.S.
544 (1961) 40
Papachristou v. City of Jacksonville,
405 U.S. 156 (1972) 40
Paris Adult Theatre v. Slaton, Cert. granted,
408 U.S. 921 (1972) 14

Page

Pinkus v. Pitchess, 429 F.2d 416 (1970) 34
Potomac News Co. v. United States, 389 U.S. 47 (1967) 31
Quantity of Books v. Kansas, 378 U.S. 205 (1964) 31
Rabe v. State of Washington, 405 U.S. 313 (1972) 25,40,42,48,49
Ratner v. California, 388 U.S. 442 (1967) 30
Redrup v. New York, 386 U.S. 767 (1967) 28,30
Robert Arthur Management Corp. v. State of Tennessee, 414 S.W.2d 638 (1967) 31
Robinson v. Neil, 409 U.S. 505 (1973) 37
Roth v. United States, 354 U.S. 476 (1957) 20,28,30,31,32,50
Schackman v. California, 388 U.S. 454 (1967) 31
Sheperd v. New York, 388 U.S. 44 (1967) 31
Shuttlesworth v. Birmingham, 394 U.S. 147 48,49
Stanley v. Georgia, 394 U.S. 567 (1969) 33
Stovall v. Denno, 338 U.S. 293, 297 (1967) 36
Stroud v. Indiana, 273 N.E.2d 842 (1973) 38,41
Thompson v. Utah, 170 U.S. 343 47

U.S. v. Fay, 333 F.2d 12, 15, 16 (2d Cir. 1964) 51
U.S. v. Lang, 10712-HP-CD, U.S.D.C. C.D. California (1973) 37
U.S. v. Harriss, 347 U.S. 612, 617 39,45
United States v. Orito, 41 LW 4956 (1973) 18
U.S.A. v. National Dairy Products Corp. 372 U.S. 29, 32 (1963) 15
U.S. v. 12-200 Ft. Reels of Film – U.S. 37 L.Ed. 2d 500 15,18,37,49
Walker v. Ohio, 398 U.S. 434 (1970) 31
Watkins v. U.S. 354 U.S. 178, 208 (1957) 15
Winters v. New York, 333 U.S. 507 (1948) 37
Wiener v. California, 404 U.S. 988 (1971) 28,31
Wright v. State of Georgia, 373 U.S. 284 (1963) 46

Constitutional and Statutory Provisions

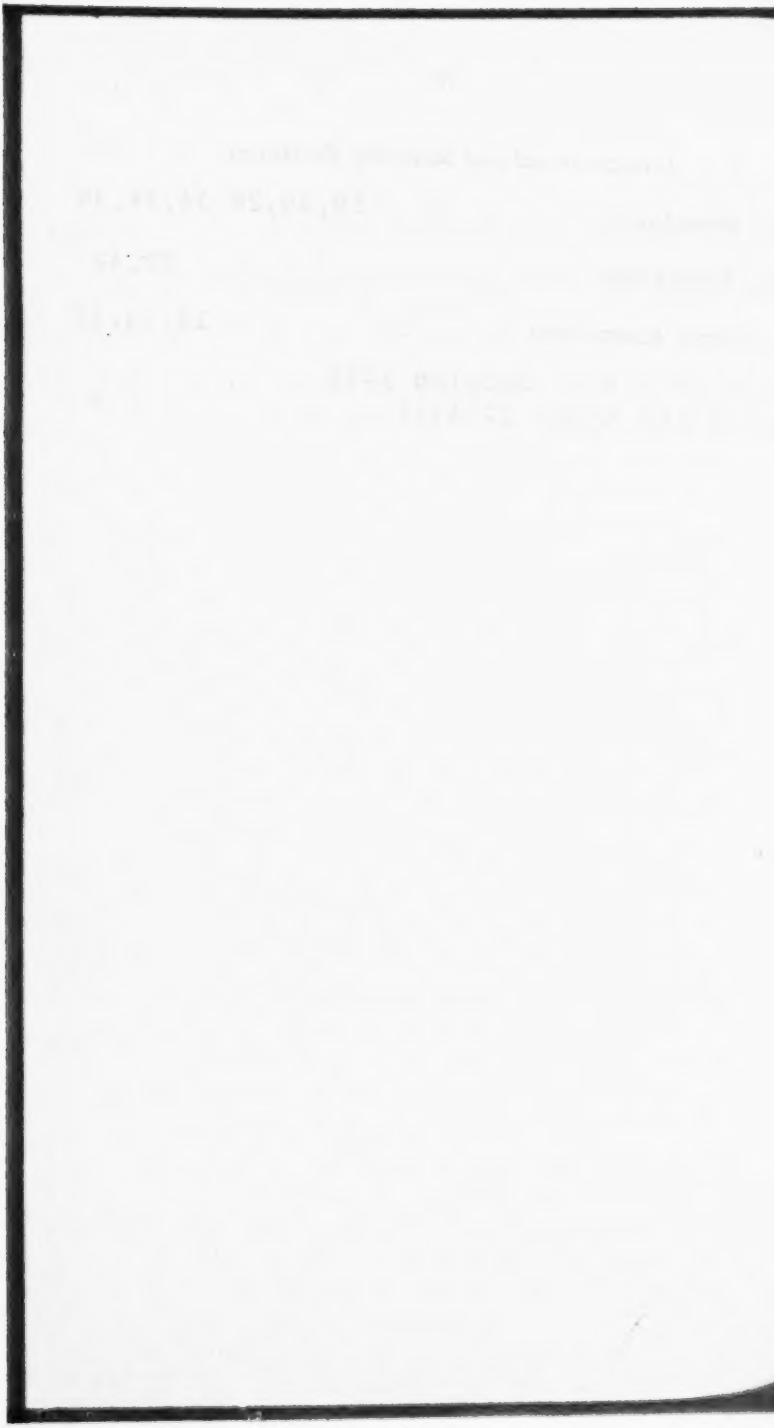
First Amendment 19,20,28,34,36,38

Fifth Amendment 37,42

Fourteenth Amendment 14,34,37

Title 18 U.S.C. Section 1462.....

Title 28 U.S.C. Section 1254(1)..... 3



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. _____

PEACHTREE NEWS COMPANY, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, PEACHTREE NEWS COMPANY, INC., a body corporate of the State of Georgia, respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the Order of that Court rendered September 12, 1973 affirming, in part, the

judgment of the U. S. District Court for the Middle District of Florida (Judge Joe J. Fisher presiding) against it in a non-jury trial for violation of Title 18 U.S.C. §1462, relating to transporting several alleged obscene books in interstate commerce

OPINION BELOW

The opinion of the U. S. District Court for the Middle District of Florida is reprinted at Appendix B, page 15 of Petition for Writ of Certiorari in Michael G. Thevis v. United States of America, case No. 73-1075. The judgment of conviction was affirmed on September 12, 1973 based in part on the opinion of the U. S. District Court and based also upon Miller v. People of the State of California, 413 F.2d. 15 (see Appendix A). A Petition for Rehearing was denied without a formal opinion on November 15, 1973 (see Appendix B).

The time to file the original Petition for Writ of Certiorari was extended by Order of this Court to January 10, 1974.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). The Petition for Rehearing was denied on November 15, 1973. A timely request for extension of time within which to file a Petition for Certiorari was granted to January 10, 1974. This Petition is timely filed within that date.

QUESTIONS PRESENTED

I. ARE THE PROVISIONS OF TITLE 18, U.S.C. §1462 AS WRITTEN AND AS APPLIED HEREIN REPUGNANT TO THE FIRST AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY IN THAT THE DEFINITION OF WHAT IS DETERMINED TO BE OBSCENE DOES NOT MEET THE STRICT TESTS LAID DOWN BY THIS COURT IN MILLER V. CALIFORNIA?

II. ARE THE PUBLICATIONS INVOLVED IN THE CASE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AND THUS ARE PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AS THE SAME WAS APPLICABLE DURING THE PERIOD OF TIME COVERED BY THE ALLEGED OFFENSE CHARGED AGAINST PETITIONER?

III. CAN THE VARIOUS UNITED STATES SUPREME COURT RULINGS ON OBSCENITY PROMULGATED ON JUNE 21 AND JUNE 25, 1973, EFFECTING A SUBSTANTIAL DECISIONAL CHANGE IN THE APPLICATION OF CONSTITUTIONAL PRINCIPLES, BE APPLIED RETROACTIVELY TO PETITIONER IN THE CASE AT BAR FOR CONDUCT OCCURRING PRIOR TO THOSE DECISIONS, AND, IS THE APPLICATION OF THE STATUTE TO SAID PETITIONER VOID AS EX POST FACTO LEGISLATION BY VIRTUE OF ARTICLE I, SECTIONS 9 AND 10 OF THE UNITED STATES CONSTITUTION?

IV. IS THERE A REASON TO GRANT CERTIORARI BECAUSE OF THE SUBSTANTIAL CONFLICT BETWEEN THE CIRCUITS IN THE APPLICATION OF MILLER STANDARDS TO PRE-MILLER CONDUCT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States,

Amendment I

Id, as pertinent:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Amendment V

Id, as pertinent:

> . . . Nor [shall any person] be deprived of life, liberty, or property, without due process of law; . . .

Article 1, Section 9

Id, as pertinent:

> No Bill of Attainder or ex post facto Law shall be passed.

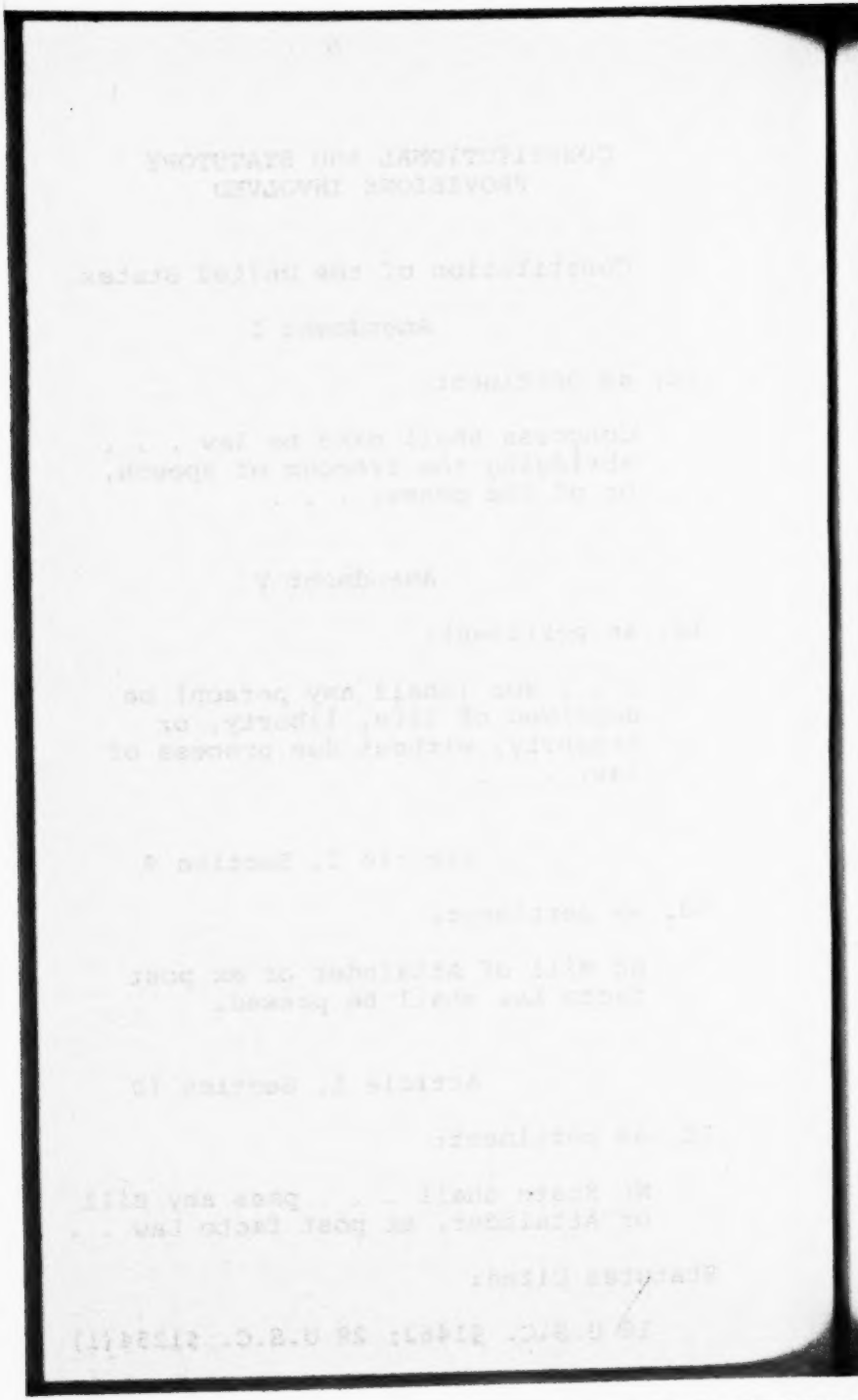
Article 1, Section 10

Id, as pertinent:

> No State shall . . . pass any Bill of Attainder, ex post facto Law . . .

Statutes Cited:

> 18 U.S.C. §1462; 28 U.S.C. §1254(1)



COPY PRINTED CLOS

STATEMENT OF THE CASE

A. Nature of the Case

On May 14, 1970 a twelve-count indictment was returned in the U. S. District Court for the Middle District of Florida, charging defendants-appellants MICHAEL G. THEVIS, individually, and PEACHTREE NEWS COMPANY, INC., a body corporate of the State of Georgia, with violation of Title 18 U.S.C. §1462. (The indictment may be found at Appendix C, pages 1-6.)

Except for the language of the publications, the language in each count is essentially the same and the publications charged as obscene were as follows:

Count 1 - "Duo"

Count 2 - "Boys and Their Male Lovers"

Count 3 - "Domino" Vol. 1, No. 1

Count 4 - "Love Knot:

Count 5 - "Wanton"

Count 6 - "My Boys" Vol. 1, No. 1

E TO EDGE

Count 7 - "In and its Nice"

Count 8 - "The Girlfriends" Vol.2, No.2

Count 9 - "Pussy Willow"

Count 10 - "Arcadia" Vol. 6, No. 2

Count 11 - "Teenage Jaybird"

Count 12 - "Cloud 9" Vol. 6, No. 3

B. Course of the Proceedings and Disposition

On July 10, 1970 defendants appeared in court at the arraignment to enter pleas of "not guilty" and a time was set for the filing of pretrial motions.

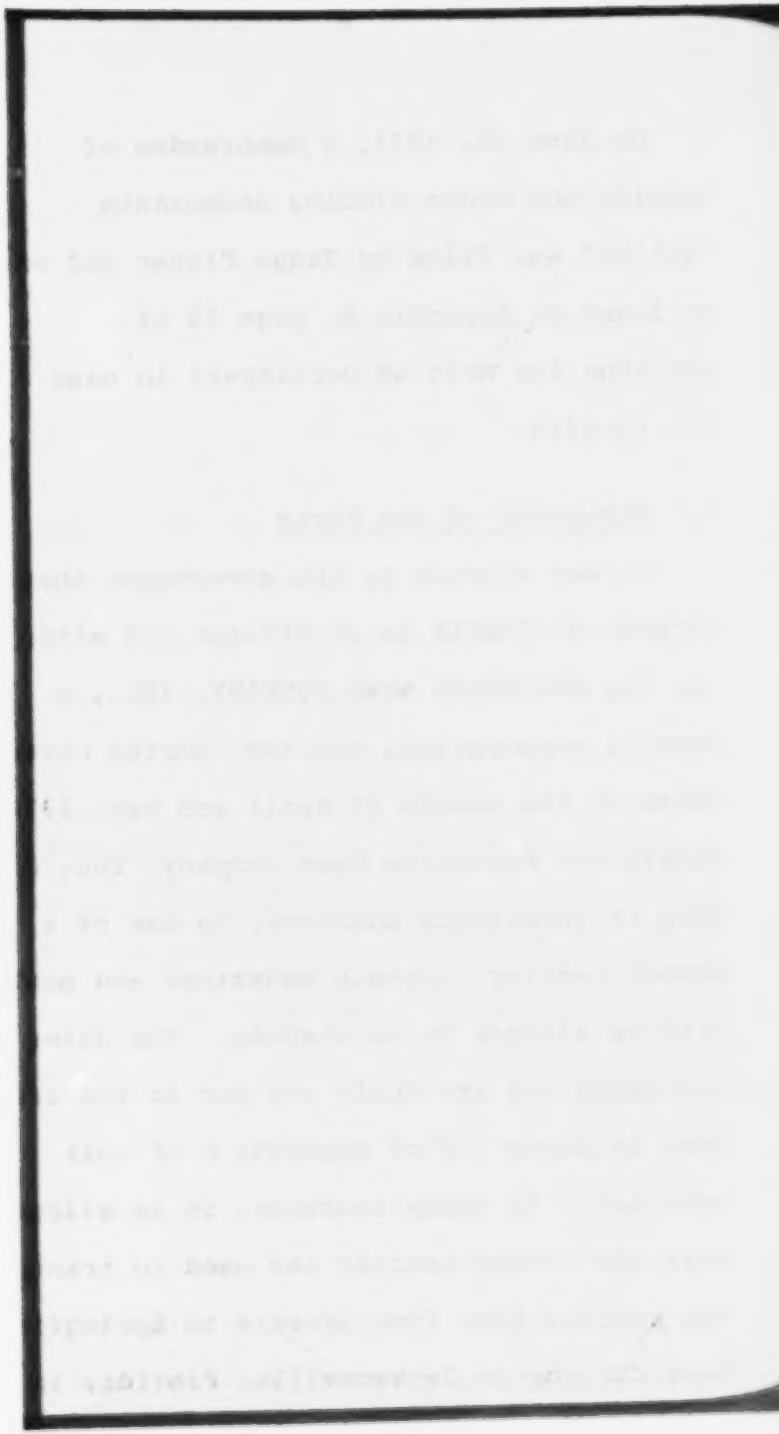
The motions were filed and were denied by the court and trial commenced before visiting Judge Joe J. Fisher of the Eastern District of Texas on October 30, 1970, without a jury, both parties having waived the same.

Taking of testimony was concluded on November 2, 1970, and the case was taken under advisement on that date with time given counsel to file briefs.

On June 25, 1971, a Memorandum of Opinion and Order finding defentants "guilty" was filed by Judge Fisher and may be found at Appendix B, page 15 of Petition for Writ of Certicrari in case No. 73-1075.

C. Statement of the Facts

It was alleged by the government that MICHAEL G. THEVIS is an officer and alter ego for PEACHTREE NEWS COMPANY, INC., a Georgia corporation, and that during certain dates in the months of April and May, 1970, Thevis and Peachtree News Company, Inc. did ship in interstate commerce, by use of a common carrier, certain magazines and publicaticns alleged to be obscene. The dates and magazines are fully set out in the indictment in pages 1-6 of Appendix C of this Petiticn. In every instance, it is alleged that the common carrier was used to transport the publications from Georgia to Springfield News Company in Jacksonville, Florida, in



violation of 18 U.S.C.§1462.

To prove its case, the government called various representatives of trucking lines to testify how certain materials did, in fact, move in interstate commerce on the approximate dates covered in the indictment and that the publications charged in the counts of the indictment were the publications moved in interstate commerce on the dates mentioned. The government further called as a witness the alleged proprietor of the Springfield News Company, the supposed consignee of the publications alleged to be obscene, together with one (1) of the former employees of said store.

Certain FBI agents and an ex-employee of Peachtree News Company, Inc. were called to testify regarding Mr. Thevis' connection with Peachtree News Company, Inc. and its business operation and activities.

Having utilized the categories of witnesses indicated to prove (a) interstate shipment of publications by (b) common carrier (c) on the approximate date indicated and (d) Mr. Thevis' alleged close involvement with the management and affairs of Peachtree News Company, the government took each of the twelve (12) publications charged with being obscene and submitted them to a psychiatrist by the name of DR. BLAINE E. MC LAUGHLIN, who it called as a witness. Dr. McLaughlin's testimony was to the effect that the publications appealed to the prurient interest, as he understood the definition of those words. He further stated that in his mind the material in question could cause people to act out with others than those to whom they had a pre-existing commitment of trust.

The defendants called two (2) expert witnesses on the question of the nonobscenit

of the publications. Dr. Frank Calhoun is a clinical psychologist in private practice in Jacksonville, Florida and a trained psychotherapist. After reviewing the materials charged against defendants, Dr. Calhoun was asked whether he had an opinion as to whether the materials appealed to a prurient interest in sex. His response was ". . . my opinion is that they do not." The doctor was asked whether these publications, or any of them, appealed to the prurient interest of the lesbian, and it was his opinion that they do not. It was asked whether the publications, or any of them, would appeal to the prurient interest of the homosexual, and he indicated that, in his opinion, they would not.

Dr. John Money from Johns Hopkins was called by the defendants and he is a medical psychologist who has been dealing

with people and their sexual problems for approximately twenty (20) years as a trained professional. He holds a joint professorship in both the University and the School of Medicine. Dr. Money testified that the material did not appeal to the prurient interest in sex of either average persons or homosexuals in our society, that the material had a value in society for their use as tools of education, and had serious social value and did not go substantially beyond the customary limits of candor in the representation of sex or nudity.

The trial court in its opinion found, in essence as follows:

(1) The publications are not "hard-core pornography;"

(2) The evidence does not involve obtrusive dissemination or an environment where the material is likely to fall into the hands of juveniles, and

(3) The magazines in question were not 'pandered'.

The Court denied the Motions for New Trial and entered judgment as follows as to petition corporation on June 25, 1971:

That Peachtree News Company, Inc. be fined $5,000 as to each of counts 1-12 but that the defendant be required to pay only $15,000 as to each of counts 1-12 on said fine for an aggregate sum of $18,000, the remaining balance of $3,500 as to each of counts 1-12 shall be suspended.

Counsel thereafter filed timely appeal under Rule 4(b) of the Federal Rules of Appellate Procedure, the same being dated and filed July 14, 1971.

On September 12, 1973 the Court of Appeals for the Fifth Circuit confirmed in part and reversed in part the decision, cited as 484 F.2d 1149. A Petition for Rehearing and Rehearing En Banc filed by both the government and defendant were denied on November 15, 1973.

REASONS FOR GRANTING THE WRIT

I.

THE PROVISIONS OF TITLE 18, SECTION 1462, OF THE UNITED STATES CODE AS WRITTEN, AND AS APPLIED HEREIN, ARE REPUGNANT TO THE FIRST, AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY IN THAT THE DEFINITION OF WHAT IS DETERMINED TO BE OBSCENE DOES NOT MEET THE STRICT TESTS LAID DOWN BY THIS COURT IN MILLER V. CALIFORNIA.

On June 21, 1973 the United States Supreme Court announced its holdings in five (5) cases submitted after argument which has forever changed the operative obscenity laws.

The cases to which we make reference are as follows:

A. *Miller v. State of California,* 413 U.S. 15;

B. *Paris Adult Theatre I, et al v. Slaton,* 413 U.S. 49;

C. *U.S.A. v. Orito,* 413 U.S. 139;

D. *Kaplan v. State of California,* 413 U.S. 115;

E. *U.S.A. v. 12-200 Ft. Reels of Super 8mm Film, et al.,* 413 U.S. 123.

Predicated on the foregoing decisions, the Court on June 25, 1973, by summary action and/or *percuriam* decisions vacated sixty (60) other obscenity cases on its docket in which no prior action had been taken. For a summary review of the cases to which we make reference herein, please note 413 U.S. 902 to 916.

All of the vacated cases, without exception, proceeded under the *Roth - Memoirs* formulation and included one, *Cote v. U.S.A.*, No. 71-1120,413 US 915 ,wherein the defendant plead guilty and thereafter challenged the constitutionality of the statute on appeal. All cases were, as previously stated, vacated and remanded for disposition by the lower courts.

As we have previously contended, it is the position of Appellant that the statute under which it has been charged is void for vagueness in that no criteria are set forth as would give fair notice of the precise standards of criminality before the commission of the alleged offense. *Watkins v. U.S.*, 354 U.S. 178, 208 [1957].

When dealing with a claim of void for vagueness in the penumbra of the *First Amendment,* we must be mindful of the decision of the United States Supreme Court in *U.S.A. v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963), wherein the Court stated:

"In this connection we also note that the approach to 'vagueness' governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See Thornhill v, [State of] Alabama, 310 U.S. 88, 98, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940); N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 [9 L.Ed.2d 405]."

To support our contention herein, we should like to briefly review the written opinions identified herein as cases (A) through (E) as will support our position.

Mr. Chief Justice Burger, in *Miller v. California, supra,* conceding the failure of the Court to set forth precise constitituional standards, writes in part as follows:

"Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States[police power. See, e.g. Redrup v. New York, 386 U.S. 767, 770-771 (1967). We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication [footnote omitted].' Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 704-705 (1968) (Harlan, J., concurring and dissenting)."

In a footnote 3 of the majority opinion appended to the foregoing quote, we read:

"In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. Redrup v. New York, 386 U.S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the Redrup 'policy.' See Walker v. Ohio, 398 U.S. 434, 435 (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us."

The majority opinion further points out:

"The case we now review was tried on the theory that the California Penal Code §311 approximately incorporated the three-stage Memoirs test, supra. But now the Memoirs test *has been abandoned* as unworkable by its author and *no member of the Court today supports the Memoirs formulation.*" (Emphasis supplied.)

After recognizing the failure of any constitutional definiation of what is obscene accepted by a majority of the Court, the opinion of Mr. Chief Justice Burger goes on to state the singular unvarying factor which represents a consensus of prior decisions of the Court:

"This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment, Kois v. Wisconsin, 408 U.S. 229

(1972). United States v. Reidel, 402 U.S. 351, 354 (1972). Roth v. United States, 354 U.S. 476, 485 (1957). 'The First and Fourteenth Amendments have never been treated as absolute (footnote omitted).' Breard v. Alexandria, supra, 341 U.S. 622 at 642 (1951), and case cited. See Times Film Corp. v. Chicago, 365 U.S. 43, 47-50 (1961); Joseph Burstyn, Inc. v. Wilson, supra 343 U.S. at 502 (1952)."

Thereupon the Court goes on to state what it now promulgates as a new constitutional standard for State cases (and in *U.S. v. Orito, supra,* and *U.S.A. v. 12-200 Ft. Reels of Super 8mm Film, supra* [see footnote] made potentially applicable to a federal obscenity case, after legislative enactment or authoritative judicial construction by the United States Supreme Court):

"We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., v. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

The opinion of Mr. Chief Justice Burger speaking for the majority pointing to the prospective operation of the newly announced constitutional standards, after either future

legislative enactment or authoritative judicial construction (if possible) stated :

> 'Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)."

It is important to note the context in which the Court was called upon to define the press materials that a State could permissibly regulate, and, in *Miller v. California, supra,* the new constitutional gloss placed on obscenity-pornography cases must be considered in light of the aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive sexually explicit materials. In Mr. Chief Justice Burger's opinion appears the following caveat:

> "This case involves the application of a State[s criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material[2] when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. Stanley v. Georgia, 394 U.S.

629, 637-643 (1968). Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 690 (1968). Redrup v. New York, 386 U.S. 767, 769 (1967). Jacobellis v. Ohio, 378 U.S. 184, 195 (1964). See Rabe v. Washington, 405 U.S. 313, 317 (1972) (Burger, C.J. concurring); United States v. Reidel, 402 U.S. 351, 360-362 (Marshall, J., concurring) (1971); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). Breard v. Alexandria, 341 U.S. 662, 644-645 (1951); Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949); Prince v. Massachusetts, 321 U.S. 158, 169-170 (1944). Cf. Butler v. Michigan, 352 U.S. 380, 382-383 (1957); Public Utilities Comm n v. Pollak, 343 U.S. 451, 464-465 (1952). It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment."

See also footnote 2 in further explanation.

Miller v. California, supra, is the key case in which the United States Supreme Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the *First Amendment.* It is obvious that the Court undertook to formulate standards more concrete than those that have ever been in the past. The sharpenss of the break with *Roth* when the Court handed down *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) was not nearly so great as the break with *Memoirs* that was handed down by the Court in *Miller v. California, supra,* as far as specifically designating prohibited material is concerned. The Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and the Court confined the permissible scope

of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

The Court discussed the press materials to which the regulation would be confined, the press materials which would constitute the offense and the guidelines necessary to forewarn a potential wrong doer. The element of the three part test and the key guideline for the trier of fact in the new tripartite test clearly indicate the facial invalidity of the federal statute where we read:

> "(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct in a patently offensive way, sexual conduct that is specifically defined by state law . . . If the state law that regulates obscene material is thus limited as written and construed, the material may be regulated."

Clearly, if the provisions of the Statute are to be limited to press materials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically defined in writing by the Congress, or if specific hard core sexual conduct must be read into the statute by authoritative judicial construction, the present Statute under attack is not sufficient to regulate those works depicting and describing that conduct.

The United States Supreme Court gave at least fourteen (14) "plain examples" of what state legislatures could define as patently offensive, hard core sexual conduct. Therefore it is fair to apply those examples and ask the following questions using the plain wording of the examples given by Mr. Chief Justice Burger:

(1) What patently offensive representation of ultimate, normal, actual, sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(2) What patently offensive representation of ultimate, perverted, actual sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(3) What patently offensive representation of ultimate, normal, simulated, sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(4) What patently offensive representation of ultimate, perverted, simulated, sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(5) What patently offensive representation of masturbation is defined or specified in the law in question or by authoritative judicial construction?

(6) What patently offensive representation of excretory functions are defined or specified in the law in question or by authoritative judicial construction?

(7) What patently offensive representation of lewd exhibition of the genitals is defined or specified in the law in question or by authoritative judicial construction?

(8) What patently offensive description of ultimate, normal, explicity actual sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(9) What patently offensive description of ultimate, perverted, explicit actual sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(10) What patently offensive description of ultimate, normal, simulated sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(11) What patently offensive description of ultimate, perverted, simulated, sexual acts are defined or specified in the law in question or by authoritative judicial construction?

(12) What patently offensive description of masturbation is defined or specified in the law in question or by authoritative judicial construction?

(13) What patently offensive description of excretory functions are defined or specified in the law in question or by authoritative judicial construction?

(14) What patently offensive description of lewd exhibition of the genitals is defined or specified in the law in question or by authoritative judicial construction?

The answer to all the questions is NONE and these are only fourteen (14) examples of what the Congress could do in creating or specifying new operational obscenity statutes.

In other words, it is one thing to "elaborate" on the Roth test as did the Memoirs court without judicially legislating. It is another to "create anew and engraft the Miller test" onto the present statutes. Any conviction or indictment pending trial based on the present statute judicially incorporating the Miller test of specificity should be set aside. It is clear that any authoritative judicial construction by the United States Supreme Court incorporating the Miller test must fail at this juncture because the statute as written fails to give any person fair notice that criminal liability is dependent upon a new Supreme Court suggested test that only legal researchers could appreciate at this point in time.

upon a new Supreme Court suggested test that only legal researchers could appreciate at this point in time.

The United States Supreme Court's per curiam opinion in *Rabe v. Washington*, 405 U.S. 313 (1972) clearly indicated that the application of a statute in this manner would violate one's right to Due Process of law. Engrafting *Miller* standards into the statute as written or a might be subsequently construed by authoritative judicial construction in an effort to prevent Congress having to take the trouble to enact a new statute, punishes one for conduct that was not criminal at the time that it is committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. There is just no doubt that the constitutional requirement of definitiveness is violated by the U.S. statute because it fails to give a person or ordinary intelligence fair notice that his contemplated conduct is forbidden by its provisions. No man can be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

The apparent constitutionally impression of the Alabama statute, if this Court takes no action, will become retroactively expanded by judicial construction to the detriment of the ordinary adult in our society. Facially, the statute is void for vagueness. The man in the street looking at this statute, however, will be lulled into a false sense of security because he has no reason to suspect that conduct clearly not described in the statute and outside of the scope of the statute as written could be retroactively brought within the statute by an act of judicial construction, depending on

the judicial district. A deprivation of the right of fair warning results from an unforeseeable and retroactive judicial expansion of vague and imprecise statutory language, which is what the United States will seek to convince this Court that it should do.

This Court's failure to strike down the applicable statutes as being vague will permit an unforeseeable judicial enlargement of the criminal statute before it, which will be applied retoractively, and which will operate precisely like an *ex post facto* law. All those actions done before the United States Supreme Court's announcing of new standards and which were done innocently under old standards can now become criminal acts and punishable by judicial fiat. The Congress and the States are barred by the *ex post facto* clause of the *Constitution* from passing laws of this nature and surely this Court and the various inferior courts must be barred by the due process clause from achieving precisely the same results by judicial construction.

It is interesting to note that in only one case, *Kaplan v. California, supra,* did this Court affirmatively agree that the publication ("Suite 69") was obscene under the *Roth – Memoirs* formulation, which was an express part of the California Penal Code §311 (at page 4960) but, notwithstanding the concurrence of the majority of the United States Supreme Court with the independent constitutional judgment of the California appellate courts on review that the said publication was obscene, and notwithstanding the further finding by the Court that:

> "On the record in this case, the prosecution's evidence was sufficient, as a matter of federal constitutional law to support Petitioner's conviction."

The case was also vacated and remanded.

The action of this Court in vacating and remanding is an express acknowledgement of the patent unconstitutionality of the California Penal Statute. This Court sent the matter back to the appellate court for disposition consistent with its decisions announced on June 21, 1973, including the possibility of allowing the appellate court to make, if it could, a judicial construction to be applied prospectively. It is clear that the California appellate court was given an opportunity to establish, if it could consistent with its constitutional authority, an authoritative judicial construction of the regulating State statute which would implement the newly announced permissible constitutional standards for judging proscribable obscenity, including 'hard core' sexual conduct that is specifically defined by State law.

It is clear, then, that in the event of such a ruling, Mr. Kaplan should not be held accountable.

The Supreme Court has stated:

> "A ruling which is purely prospective does not apply even to the parties before the Court." Linkletter v. Walker, 381 U.S. 618 (1965) at page 621.

See also:

England v. Board of Medical Examiners, 375 U.S. 411;

Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358.

II.

THE PUBLICATIONS INVOLVED IN THE CASE ARE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AND THUS ARE PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AS THE SAME WAS APPLICABLE DURING THE PERIOD OF TIME COVERED BY THE ALLEGED OFFENSE CHARGED AGAINST THE PETITIONER.

The pictorial magazines involved herein are comparable to those held protected by this Court in Wiener v. California, 404 U.S. 988 (1971), as well as other decisions of this Court citing Redrup v. New York, supra, as authority.

Ever since the United States Supreme Court determined, in Roth v. United States, supra, that the First Amendment did not protect obscene materials, it has necessarily assumed the responsibility of devising formulae for recognizing the "dim and uncertain", Bantam Books v. Sullivan, 372 U.S. 58, 60 (1963), which separates obscenity from protected expression. That the Court, in its attempts to separate obscenity from protected expression, has had its difficulties in articulating clear standards for prosecutors, courts, and citizens to follow is readily apparent from the multitude of

citizens to follow is readily apparent from the multitude of fragmented opinions, which have emanated from the Court in lieu of clear majority decisions; *e.g., Memoirs v. Massachusetts,* 383 U.S. 143 (1966); *Ginzburg v. United States, supra; Jacobellis v. Ohio,* 378 U.S. 184 (1964), and the numerous others without opinion which have characterized the Court's efforts in this sphere.

This Court on June 21, 1973, long after the time of the alleged offense, has articulated standards for the future which they suggest will pass constitutional muster in *Miller v. California* and the other cases decided on that day. The majority of this Court attempted to find a solution to the imprecision of the various standards relied upon by the members of the Court prior tothis time and set out to fashion such new standards.

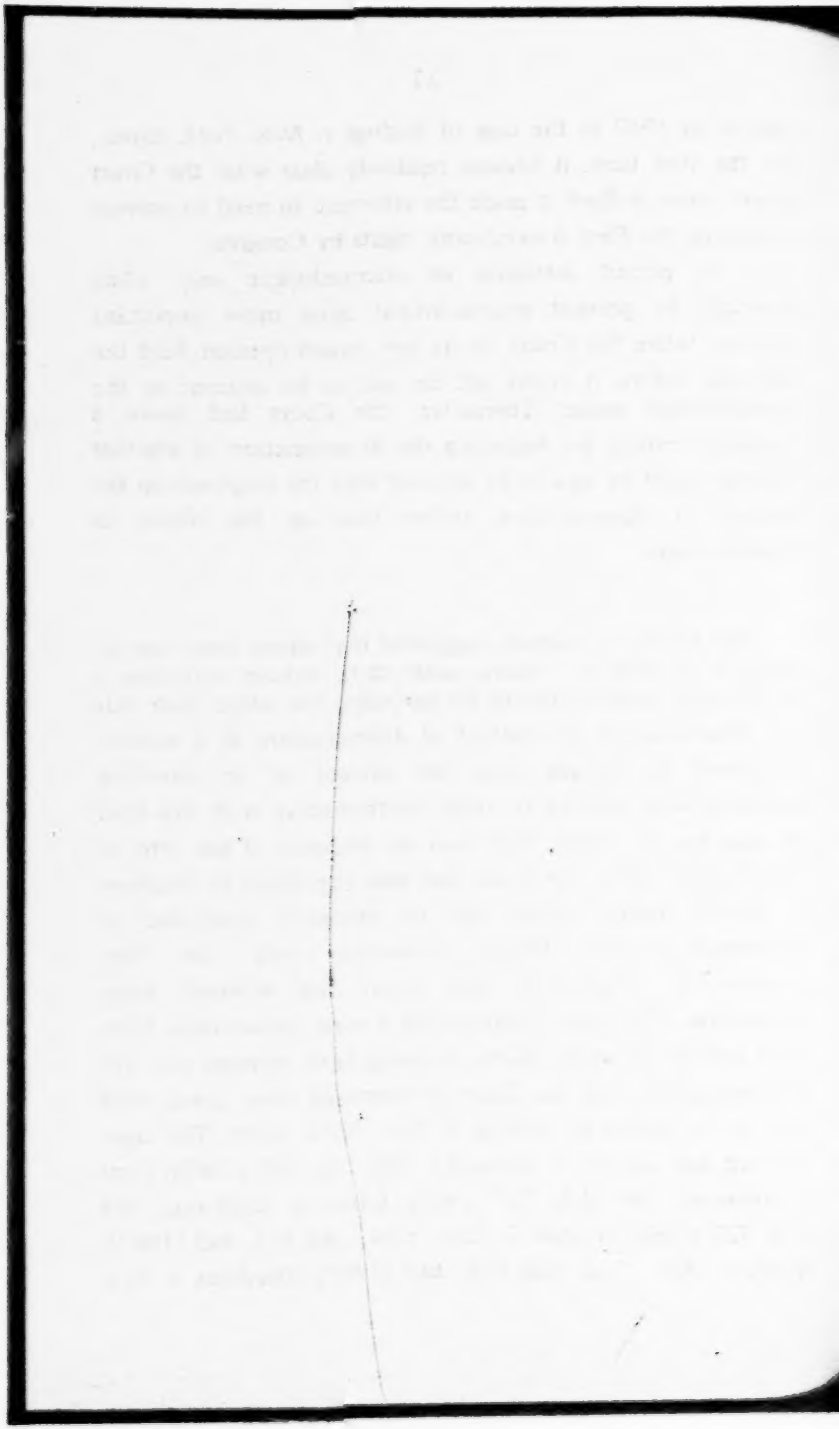
The Petitioner should be judged, if at all, by the status of the law on the standards being applied by the Courts as of the time of the commission of the alleged offense (April and May 1971) Briefly, the law which was being applied at that time by this Court permitted a certain type of judicial review which has been characterized as the Redrup approach, and we shall address ourselves to the status of the law as it was prior to June 21, 1973 for the purposes of this argument.

It would be time-consuming and fruitless to detail each and every case that has appeared before the Court after Roth, but it is significant to note a trend developed, which found

fruition in 1967 in the case of *Redrup v. New York, supra,*. For the first time, it became relatively clear what the Court meant when in *Roth* it made the reference to need to prevent erosion in the *First Amendment.* rights by Congress

to permit intrusion or encroachment only when necessary to prevent encroachment upon more important interests, when the Court, in its *per curiam* opinion, held the materials before it could not be said to be obscene in the constitutional sense. Thereafter, the Court laid down a suggested criteria for balancing the determination of whether material could be said to be obscene with the emphasis on the manner of dissemination, rather than on the object of dissemination.

This Court, in essence, suggested that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of the type of "pandering" which the Court had seen significant in *Ginzburg v. United States,* supra, that no obscenity confiction or suppression could follow consistent with the *First Amendment.* Thereafter, the Court has reversed some thirty-three (33) cases, representing a wide cross-section from both federal and state courts, involving both criminal and civil condemnations, and the Court, in reversing these cases, cited only as its authority *Redrup v. New York, supra.* The cases reversed are: *Austin v. Kentucky,* 386 U.S. 767 (1967); *Gent v. Arkansas,* 386 U.S. 767 (1967); *Ratner v. California,* 388 U.S. 422 (1967); *Cobert v. New York,* 388 U.S. 443 (1967); *Keney v. New York,* 388 U.S. 440 (1967); *Friedman v. New*



York, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. State of Louisiana*, 392 U.S. 655 (1968); *Carlos v. New York*, 396 U.S. 119 (1969); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Deykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt, et al v. State of Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina, supra, Wiener v. California, supra; Hartstein v. Missouri*, 404 U.S. 988, 30 L.Ed. 2d 539 (1971).

While *Roth* attempted to provide analytic tools for the separation of protected from unprotected expression,[1] a majority of the Court has yet to agree on a precise test for determining obscenty.[2]

---

[1] But see Stewart, J., dissenting in *Ginzburg v. United States, supra:* "It is not accurate to say that the *Roth* opinion 'fashioned standards' for obscenity, because, as the Court explicitly stated, no issue was there presented as to the obscenity of the material involved (354 U.S. at 481, n. 8). And in no subsequent case has a majority of the Court been able to agree on any such 'standards'."

[2] Probably the verbal formula closest to consensus so far appeared in *Memoirs v. Massachusetts, supra:* "... three

Admitting that the *Roth* Formula "is not perfect", *Jacobellis v. Ohio, supra,* raises "difficult problems", *Ibid.*, and is afflicted with "perhaps inherent residual vagueness", *Ginzburg v. United States,* supra, the Court's decision to adhere to *Roth* – "that we should try to live with it – at least until a more satisfactory definition is evolved", *Jacobellis v. Ohio, supra,* at 200 – was an interim accommodation to the Court's inability to reach a real consensus on the subject. Subsequent experience with the problem has produced no greater unanimity. Two Justices, Black and Douglas, who dissented in *Roth,* had never accepted the principle that obscenity may be regulated without violence to the *First Amendment* (see E.g., *Ginzburg v. United States, supra* at 476 [Black, J. dissenting] and at 482 [Douglas, J., Dissenting].

A third, Justice Stewart, held the view that obscenity regulation may be constitutional only if applied to "hard-core pornography."[3] Yet a fourth, Justice Harlan, had, when on

---

(Footnote 2 Continued)
elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U.S. 413, 418 (1966).

[3] A preliminary, rather unilluminating definition of hardcore pornography, "I know it when I see it", *Jacobellis v. Ohio, supra* at 197 (Stewart, J., concurring) has been supplemented by Justice Stewart by the following description "of the kind of thing to which I have reference": "Such materials include photographs, both still and motion picture, with no pretense of artistic value, *graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism,* and sometimes involving several participants in scenes of orgy-like character . . ." *Ginzburg v. United States, supra* at 499, n. 3 (Stewart, J., dissenting). (Emphasis added.)

the bench, adopted the "hard-core pornography" test as to federal prosecutions, but had urged more latitude for conviction in state criminal cases. *Jacobellis v. Ohio, supra* at 204 (Harlan, J., dissenting). Justice Brennan, together with former Chief Justice Warren and former Justice Fortas, had adhered to the three-pronged enunciated in *Memoirs v. Massachusetts,* 383 U.S. 413, (1966), *set out in full in Ginzburg v. United States, supra* at 476 (Black, J., dissenting) and at 482 (Douglas, J., dissenting), a "not dissimilar standard" from the "hard-core pornography" test. The *per curiam* opinion in *Redrup v. New York* so equates the hard-core pornography test and the three-pronged *Memoirs* test. 386 U.S. 767, 770-771 (1967). And there are indications that three (3) of the newer justices, Chief Justice Burger, and Justice Blackmun, *Ibid.,* follow Justice Harlan's views and that Justice Marshall (see majority opinion in Marshal, J., in *Stanley v. Georgia,* 394 U.S. 557 (1969)) has adopted Justice Brennan's conception of *First Amendment* interpretation in this sphere.

Moreover, a majority of the Court has united to underscore the irrelevancy, for constitutional purposes of the claim that material is "arguably devoid of any ideological content", for "the line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all", *Stanley v. Georgia, supra,* citing with approval, *Winters v. New York,* 333 U.S. 507 (1948).

Findings of obscenity have been reversed as to publications devoted entirely to explicitedly depicting or describing the sexual activities of its characters, including

detailed and vernacular descriptions reaching the ultimate in explicitness, of heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity; *e.g., Memoirs v. Massachusetts,* supra, ("Fanny Hill"); *Aday v. United States, supra* ("Sex Life of a Cop", see description of book at 357 F.2d 855); *Corinth Publications v. Wesberry, supra,* ("Sin Whisper", see description of book at 146 S.E. 2d 764); *Mazes v. Ohio,* supra, ("Orgy Club"); *Hoyt v. Minnesota, supra,* ("The Way of a Man With a Maid", "Lady Susan's Cruise Lover", and three other books); and *Grove Press v. Gerstein,* 378 U.S. 577 (1964) ("Tropic of Cancer").

With respect to motion picture films, the Court has reversed findings of obscentity as to films which depict totally nude women, films which show nude or partially nude woman and men engaged in sexual gyrations, simulated intercourse, and simulated oral-genital intercourse, all emphasizing pubic and rectal areas, films showing lesbian sexual activity and heterosexual activity between men and women. Moreover, the Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity of a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess,* 429 F.2d 416 (CA-9 1970), *aff'd* 400 U.S. 922 (1970), *sub. nom., Pinkus v. California.*

Thus, the only conclusion which could have been rationally extrapolated from these decisions without opinion is that any publication containing exclusively pictorial material which depicts, graphically and exclusively, nudes in

sexual poses and movement, even without presence of social importance, is constitutionally protected. Should the pictures show graphic depiction of sexual acts accompanied by substantial test material, then requisite social value is present and thus, the material would not be obscene.

The press materials at bar when considered as a whole, and as judged against press materials of similar or more explicit sexual content – heretofore, determined by this Court, prior to June 21, 1973 not to be obscene in the constitutional sense, should thus be protected, and the decision of the United States Court of Appeals for the Fifth Circuit be reversed.

III.

THE VARIOUS UNITEDSTATES SUPREME COURT RULINGS ON OBSCENITY PROMULGATED ON JUNE 21 AND JUNE 25, 1973, EFFECTING A SUBSTANTIAL DECISIONAL CHANGE IN THE APPLICATION OF CONSTITUTIONAL PRINCIPLES, CANNOT BE APPLIED RETROACTIVELY TO PETITIONER IN THE CASE AT BAR FOR CONDUCT OCCURRING PRIOR TO THOSE DECISIONS AND, THE APPLICATION OF THE STATUTE TO SAID PETITIONER IS VOID AS EX POST FACTO LEGISLATION BY VIRTUE OF ARTICLE I, SECTIONS 9 AND 10 OF THE UNITED STATES CONSTITUTION.

The newly announced decisions of the Supreme Court in which reference has been made herein represented "a clear

break with the past," in the words of Mr. Justice Stewart in *Desist v. United States,* 394 U.S. 244, 248 (1969).

On June 25, 1973 in a matter coming out of the Fifth and Second Circuits, the United States Supreme Court updated and restated its concept of retrospective and prospective application of decisional law making.

In the case of *Gosa v. Mayden,* et al, 13 CrL 3248, the question of the application of the new constitutional concept is discussed in detail, as stated in part at page 3251:

> "Rather, the prophylactic rule there formulated 'created a protective umbrella serving to enhance' a newly recognized constitutional principle. Michigan v. Payne, ____U.S.____ (1973). (41 LW 4671). That recognition and effect are given to a theretofore unrecognized and uneffectuated constitutional principle does not, of course, automatically mandate retroactivity. In Williams v. U.S.A., 401 U.S. 646, 651 (1971) Mr. justice White made it clear citing Linkletter v. Walker, 381 U.S. 618 (1965), that the Court has 'firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored."

See the extensive discussion of this subject in the following cases:

A. *Linkletter v. Walker,* Supra;

B. *Stovall v. Denno,* 388 U.S. 293, 297 (1967);

C. *Desist v. United States,* supra;

D. *Robinson v. Neil,* 409 U.S. 505 (1973);

E. *Michigan v. Payne,* Supra.

See also:

"Comment: Retroactive or merely prospective operation of new rule adopted by Court in overruling precedent – federal cases." 14 LEd 2d 992.

"Prospective Overruling and Retroactive Application in the Federal Courts." 71 Yale L.J. 907 (1962).

The United States Supreme Court on June 21 and June 25, 1973 vacated and remanded approximately sixty-eight (68) obscenity cases to the lower courts for final disposition. It is clear that the action of the Supreme Court in this regard in vacating and remanding the said sixty-eight (68) cases, including ones in which the Defendants were criminally charged with violation of the Tennessee obscenity laws, was done so with the intent that the cases be dismissed. The rationale of *Miller v. California,* supra (see *U.S. v. 12-200 Ft. Reels of Film,* supra, n. 7) is to apply only prospectively as the language of those decisions makes clear, because there was no constitutionally valid test pertaining to obscenity agreed to by a majority of the Court that would give fair warning to a defendant that his proposed course of conduct would subject him to possible criminal prosecution, and thus said vague laws were violative of the *Fifth* and Sixth *Amendment* rights of such defendants. A federal judge in the U.S. District Court for the Central District of California (Judge Pregerson) on Wednesday, July 11, 1973 dismissed a federal indictment on a Motion to Dismiss for this very reason. The case is styled as *U.S. v. Lang,* 10712-HP-CD, U.S.D.C. for the Central

District of California. State *nisi prius* court judges have dismissed indictments and/ir informants against defendants in Indiana as well as the States of North Carolina, Louisiana and California on the basis that the same were brought under a law which is now lacking in specificity according to the Supreme Court decisions and thus unconstitutional as applied to the various defendants before the Court.

It has been some period of time since the decisions of June 21 and June 25, 1973– time for some appellate courts to have considered and ruled on the question of the retroactivity aspect of the said rulings as they may relate to defendants tried and/or indicted for events occurring before June 21, 1973.

Such an example is a holding by the Supreme Court of Indiana which, on August 21, 1973, reversed the convictions of the defendants in two cases in which certiorari was granted and the cases remanded on June 25, 1973 by an order identical to the order in this case. The two cases are *Stroud v. Indiana,* 273 N.E.2d 842 (1971) and *Mohney v. Indiana,* 276 N.E.2d 517 (1971) ,wherein they unanimously held:

> "The main thrust of those opinions so far as applicable to this case is that the statute under which the appellant was convicted is unconstitutional for the reason that it is too general in nature and does not set out specifically the sexual or obscene acts which, when depicted in any of the media named by the statute, constitute a violation of the statute.
>
> Pursuant to the order and direction of the U.S. Supreme Court we hold the statute involved in this case is unconstitutional on the grounds announced by that Court.

Therefore pursuant to the order of the United States Supreme Court the judgment and conviction of Appellant – Defendant is reversed and remanded to the trial court, and pursuant to the order of the United States Supreme Court, the trial court is directed to discharge the Defendant.

All Justices concur."

The two cases which reversed the convictions are *Stroud v. State* ____ Ind. ____, 300 N.E. 2d. 67 (1973) and *Mohney v. State* ____ Ind. ____, 300 N.E.2d. 100 (1973)

It is axiomatic that any criminal statute must give fair warning of the conduct that it makes a crime. *(United States v. Harriss,* 347 U.S. 612, 617.

The Due Process clause of the *Constitution* requires that a court strike down a criminal statute where it was not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connolly v. General Construction Co.,* 269 U.S. 385, 391.

The United States Supreme Court has often recognized that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of Due Process of law, Ibid., and that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed what the State commands or forbids." *Lanzetta v. New Jersey,* 306 U.S. 451, 453.

See also:

A. *Rabe v. State of Washington,* 405 U.S. 313 (1972);

B. *Wright v. State of Georgia,* 373 U.S. 284 (1963);

C. *Palmer v. City of Euclid,* 402 U.S. 544 (1961);

D. *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

If the newly announced constitutional principles promulgated by the United States Supreme Court in approximately sixty-eight (68) judgments rendered on June 21 and June 25, 1973 were to be applied to Petitioner in the case at bar for alleged conduct said to be violative of the statute at a time during April 1971, it would thus be violative of the Due Process clause and *Ex Post Facto* clause of Article I, Section 9 and 10.

An ex post facto law has been defined by the United States Supreme Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that *aggravates* a *crime,* or makes it *greater* that it was, when committed." *Calder v. Bull,* 3 Dall 386, 390 (Emphasis supplied).

This Court has said that "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time." *King v. Missouri,* 107 U.S. 221, 135.

To put this question in better prospective, we should like to discuss the summary of the general principles that would

relate to indictments and/or informations charging violations of State and/or federal laws pending trial or on appeal as of June 21, 1973 for conduct purportedly engaged in prior to that time:

A. BLACKSTONE'S RETROACTIVE THEORY THAT A COURT MERELY DISCOVERS WHAT THE LAW HAS ALWAYS BEEN WAS REJECTED BY THE U.S. SUPREME COURT.

Thy common law theory of Blackstone was that in a new decision overruling prior decisions or putting a non-judicial gloss on a statutory interpretation the courts merely discivered what the law always was and had been, and therefore did not effect any change in the law, and thus was retroactive. The theoretical basis for this has now been rejected. *Linkletter v. Walker*, supra, at pp. 622-623 (1964); accd. *United States v. Fay*, 333 F.2d 12, 15-16 (2d Cir. 1964), with citations. In *Linkletter* the court, 381 U.S. at 623, said:

> 'Thus the accepted rule today is that in appropriate cases the court may in the interest of justice make the rule prospective."

This statement follows a five-page discussion of what the court calls the history and theory of the Blackstonian rule that "the judge rather than being the creator of the law was but its discoverer" (381 U.S. at 623) as contrasted to the Austin theory that judges do engage in intersitial lawmaking (not rewriting of statutes). In rejecting the Blackstonian theory of automatic retroactivity, the court held (381 U.S. at 627) that there was no distinction to be drawn between

criminal and civil litigation, and specifically cited the criminal income tax evasion case of *James v. United States*, 366 U.S. 213 (1961), as an example of prospective overruling in a criminal case.*

Linkletter, supra, which rejected this Blackstonian theory involves the start of the whole body of case law to determine whether expanding constitutional safeguards in favor of defendants in State criminal trials, i.e. the *Fourth, Fifth* and *Sixth Amendments*, were to be applied retroactively or prospectively. See Annotation, 22 L.Ed. 2d 824-858. The considerations in our case are quite different, but some of the principles as to when constitutional protections are to be applied retroactively may be helpful. In any event, the Blackstonian principle of automatic retroactivity has been explicitly rejected and, in addition, the decision is not retroactive on *ex post facto* and related principles.

B. LACK OF FAIR NOTICE RULE.

The basic rule is that a penal statute is void for vagueness where it is not sufficiently explicit to give fair notice and fair warning of what conduct is forbidden and proscribed. *Lanzetta v. New Jersey*, supra, at page 453 (1939); *United States, v. Harriss*, 347 U.S. 612, 617 (1954); *Rabe v. Washington*, supra, at page 316 (1972).

---

*In *James* the criminal conviction for federal income tax evasion was set aside on the grounds that the taxpayer had a right to rely on the judicial gloss placed on the statute.

This principle is also applicable where the uncertainty of the statute is not clearly revealed until and except by the court's decisions. In *Bouie v. City of Columbia,* supra, at p. 352, the court said:

> "* * *If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta,* or the 'guess at [the statute's] meaning and differ as to its application,' as in *Connally,* the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

C. ANALYSIS OF THE MILLER DECISION.

Part I of the *Miller* decision traces the history of the obscenity law from *Roth.* It states (slip op. p. 7) that "apart from the initial formulation in the *Roth* case, no majority has at any time been able to agree on a standard," that the *Memoirs* test was a plurality test only, and that as of June 21, 1973 even Memoirs had been abandoned by all members of the court.

Since under Part I of the *Miller* decision there were no standards, the court thereupon in Part II proceeded to set forth a new three-fold or tripartite test to serve as a basis for the prosecution *only when* and provided that under the second prong of the test patently offensive hard-core sexual conduct was specifically defined so as to give fair notice. The court (slip op. p. 9) states it acknowledged the dangers of regulating expression, and hence, the definitions of sexual conduct which can be prohibited "must be specifically defined by applicable State law as written or authoritatively construed."

After the court set forth the new tripartite test with examples of what might be proscribed as patently offensive depictions of sexual conduct, the court continued (slip op. p. 12):

> "Under the holdings announced today, *no one will be subject to prosecution* for the sale or exposure of obscene materials *unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined* by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. * * *" (Emphasis supplied.)

On page 14 of the slip opinion the court reiterated that it was only on June 21, 1973 that the court had agreed on concrete guidelines to isolate hard-core pornography. The Court said:

> "* * * But today, for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. Now we may abandon the casual practice of Redrup v. New York, supra, and attampt to provide positive guidance to the federal and state courts alike." (Emphasis supplied.)

D. UNITED STATES V. 12-200 FT. REELS FOOTNOTE 7 – PROSPECTIVE APPLICATION.

In footnote 7 the court said that it was the duty of federal courts to authoritatively construe federal statutes and "we are prepared to construe such terms (i.e. obscene, lewd,

lascivious as used in the statute) as limiting regulated material to patently offensive *representations or descriptions of that specific hard core sexual conduct given as examples in Miller v. California.*" (Emphasis supplied.) We pass for the moment just how the court could construe a federal statute for arrests after June 21, 1973 with this wide range of permissible definitional options without legislating and without invoking an *Erie v. Tompkins* doctrine, and turn to prospective application.

(i) The court is prepared (in the future) to construe the federal statute to limit it to depictions of "hard core sexual conduct" which were for the *first time* and as of June 21, 1973 specifically set forth in *Miller.* This is a very clear statement that as of June 21, 1973 there was no definition of patently offensive hard-core sexual conduct, which the court said *must* be present before there can be any prosecution. Criminal convictions are not predicated on noneexistent standards and nonexistent definitions.

(ii) It would appear that the judicial statement in footnote 7 of the decision in *12-200 Ft. Reels,* supra, purporting to overrule a case wholly prospectively is in fact no more than a dictum, since it is by hypothesis, inapplicable to the parties or the controversy before the court. Nevertheless, such a dictum may be significant, with respect no future transactions or evens, as an indication that further reliance on the "overruled" case is no longer justified. In fact, such a dictum can achieve virtually the same effect without even using the word "overrule" in connection with the earlier decision. That is, the court, without declaring the earlier decision overruled, can simply issue a warning that subsequent to the date of the court's opinion or some specified future

date, any reliance on the earlier decision is unwarranted. If a person subsequently attempts to rely on the earlier decision despite this warning, the court, in deciding that person's case, can conclude that reliance after the date specified in the warning was unjustified, and the court can then declare, as a holding rather than as dictum, that the earlier decision is overruled. Thus, by using a two-stage overruling process, consisting first of a warning in the form of a dictum and secondly, if necessary, of a holding overruling an earlier decision, the court can achieve a desirable effect by changing a bad rule without defeating any strong, justifiable reliance interests.

Accordingly, it is conceivable that in the context of the enforcement of the State obscenity laws, which laws can only be authoritatively construed by a state appellant Court, that what this court has done is forewarned individuals who propose to engage in the business of selling sexually explicit materials that they may no longer rely upon the more permissive standards of the *Roth-Memoirs* formulation after the date of the court's decisional change of June 21, 1973. Any defendant on appeal to the high court for conduct engaged in post-June 21, 1973 may no longer say that a judicial construction in his case would be *ex post facto* when applied to him because as of the date of his alleged offense the court had not "authoritatively construed" federal statutes because, as was made significant in *Bouie v. City of Columbia*, supra, the hypothetical defendant could have foreseen the judicial gloss that was to be placed on the statute and thus the two-stage process suggested herein would be complete by (a) the authoritative judicial construction on the state obscenity statute, and (b) the affirmation of the conviction of a defendant tried under the proposed application of that statute for post-June 21, 1973 conduct.

To this counsel, the foregoing analysis is the only common sense one with regard to the intent of the court in its carefully chosen language utilized in footnote 7 of *12-200 Ft. Reels of Film*, supra, as to Federal legislation.

E. EX POST FACTO JUDICIAL LAWMAKING PROHIBITED.

As stated, criminal convictions are not predicated on nonexistent standards. At the same time, the new test and permissible definitions of legally proscribable obscenity may not be applied retroactively, which is why, incidentally, there were no affirmations of convictions by the Supreme Court in the sixty-eight (68) cases before it and vacated.

Under *Linkletter*, supra, the Blackstonian theory of automatic retroactivity was abandoned. In addition, in determining whether a new decision should be applied retroactively the Supreme Court has specifically held that unforeseen judicial enlargement of criminal statutes is prohibited as an *ex post facto* law, *Bouie v. City of Columbia*, supra, and many authorities, while not labeling it *ex post facto*, also proscribe the retroactive application of a decisional change in criminal law by a court which would work to the disadvantage of the accused.

Ex post facto laws (prohibited by Article], Sections 9 & 10 of the Constitution) generally include a change in the statutory law which in relationship to a criminal offense alters the situation of the accused to his disadvantage. *Thompson v. Utah*, 170 U.S. 343. Both the new serious literary, etc. value test and the new optional definitions of what might be proscribed as depictions of patently offensive hard core sexual

conduct substantially alter the situation of the pre-June 21, 1973 defendant to his obvious disadvantage. In *Bouie* the court said (378 U.S. at 353):

> "Indeed, an unforseeable judicial enlargement of a criminal statute applied retroactively operates precisely like an ex post facto law such as Art. I § 10 (sic) of the Constitution forbids." (parenthesis and emphasis supplied.)

Bouie followed in *Love v. Fitzharris*, 460 F.2d 382, 385 (9th Cir. 1972), "new court decision making what was lawful when done, a crime *** prohibited by the Constitution."

While not labeled *ex post facto*, the decisions and authorities clearly prohibit a change in the criminal law by court decision which makes criminal that which was not criminal or expands the area of criminal liability by putting an interpretation on a statute which could not have been foreseen or cures a vagueness by that very decision. *James v. United States*, 336 U.S. 213, 221-222; *Shuttlesworth v. Birmingham*, 394 U.S. 147; *Bouie*, supra; *Rabe v. Washington*, supra, at p. 315; 20 Am. Jur. 2d Courts § 236; 51 Virginia Law Review 201, 254.

As previously maintained, the *James* case involved a prosecution for income tax evasion by one Mr. James who had embezzled funds but had not reported them. At the time James failed to report his income a Supreme Court decision in the Wilcox Case, *Commissioner v. Wilcox*, had held that embezzled funds did not constitute income. The Supreme Court held in *James v. United States*, supra, that the element of willfulness could not be proved in a criminal prosecution because James was entitled to rely on the statute with the

gloss placed upon it by Wilcox, and therefore the indictment had to be dismissed.

Shuttlesworth held a subsequent narrowing interpretation which can save a criminal statute cannot be applied retroactively. In *Shuttlesworth* the petitioner was convicted for failing to obtain a permit to have a parade. *Shuttlesworth* was convicted, his conviction was reversed on the grounds that the Birmingham ordinance granted too much discretion to the City of Birmingham in terms of denying parade permits. The highest court of Alabama by decision rewrote the city ordinance and after narrowly construing it, and thus saving it, thereupon reinstated *Shuttleworth's* conviction. The Supreme Court reversed. *Here pertinent,* the Supreme Court held that assuming the Alabama Supreme Court[s rewriting the ordinance was successful (394 U.S. at 155), that *Shuttlesworth* in 1963 could not have had the clairvoyance to foresee the narrowing construction which would ultimately be placed on the statute by the Alabama Supreme Court in 1967 (394 U.S. at 156).

In *Boule,* supra, 378 U.S. at 352, the court in addition to *ex post facto* (though closely allied to it) said:

> "Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute."

In *Rabe* the Supreme Court of Washington held the motion picture obscene because of the context or location of its exhibition (it was an outdoor theatre). In reversing the Supreme Court said:

"Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged from violation."

The court held no fair notice that criminal liability was dependent upon the place where the film was shown.

51 Virginia Law Review at 254:

"As to judicial changes which expand the substantive criminal law the values seem to line up on the side of prospective limitation, but to be overshadowed by the principle prohibiting ex post facto criminal lawmaking, *which demands the same result in any event.*"

The statutory test in the federal obscenity statute for determining what is obscene contains no element of the so-called *Roth-Memoirs* formulation and, none of the new tri-partite *Miller* test. Accordingly, the utilization of *Miller* standards for pre-June 21, 1973 conduct is violative of Petitioner's rights and this case should be vacated and remanded.

IV.

CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A SUBSTANTIAL CONFLICT BETWEEN THE CIRCUITS IN CONNECTION WITH THE APPLICATION OF MILLER STANDARDS TO CONDUCT OCCURRING PRIOR TO THE DATE OF THAT DECISION.

See the following:

A. First Circuit

United States v. One Reel of Film ___F.2d ____ (7/16/73)

Held: Title 19 U.S.C. §1305(a) was constitutional on its face. Movie was obscene by both standards (Memoirs and Miller), national standards possibly apply in federal obscenity cases. (Now on Petition for Certiorari to U. S. Supreme Court.)

B. Fourth Circuit

United States v. Brown, ___F.2d.___, (9/18/73)

Held: This case was vacated and remanded to the Fourth Circuit for reconsideration in light of the Miller series of cases. Without allowing counsel any rebriefing or argument, the Circuit Court again affirmed the judgment of conviction without opinion. (Now on Petition for Certiorari to the U. S. Supreme Court.)

C. Fifth Circuit

United States v. Thevis, et al, 484 F.2d 1149 (9/12/73)

Held: That both Miller and Memoirs standards to be applied and appellant given benefit of most liberal viewpoint (this approach avoided ruling on ex post facto argument), although arguing in Cote v. U.S.A 485 F.2d (19/11/73) in footnote 3 that "... with the announcement of Miller and the companion cases of the same date, the Court's 'performance' has taken a significant new turn . . " (Now on Petition for Certiorari to U. S. Supreme Court, No. 73-1075.)

D. Seventh Circuit

United States v. Sians, ____F.2d ____ (7/5/73)

Held: In a case briefed and argued before Miller, June 21, 1973, but decided on memorandum order of July 5, 1973, the Court affirmed the conviction applying Miller standards to pre-Miller conduct. (Now on Petition for Certiorari to U. S. Supreme Court, No. 73-584.)

E. Ninth Circuit

An apparent conflict appears in the decisions of varicus panels in this Circuit:

(1) U.S.A. v. Hamling, et al, 481 F.2d 307 (6/7/73)

Held: Pre-Miller ruling issued June 7, 1973 and challenged by counsel on

Petition for Rehearing raising arguments herein was affirmed by a denial of Petition without comment on 8/23/73. (Now on Petition for Certiorari to the U. S. Supreme Court, No. 73-507.)

(2) U.S.A. v. Henson, et al, ___ F.2d ___ (10/5/73), No. 73-2063

Held: Appellant's pre-Miller conduct governed by Roth-Memoirs standards. Said standards are unconstitutionally vague, conviction reversed. (Pending hearing en banc.)

F. Tenth Circuit

U.S.A. v. Friedman, ___ F.2d ___ (12/11/73), Nos. 72-1143 & 1144

Held: Reversed and remanded back to district court to re-examine facts and determine standards to be applied in any new trial, as well as a determination of applicable community (national or otherwise). (Now pending on government's Petition for Rehearing.)

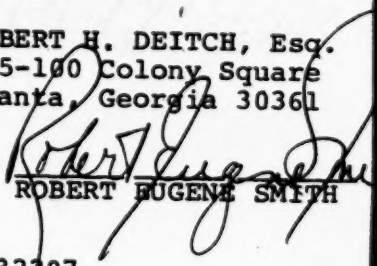
CONCLUSION

For the reasons suggested herein, as well as those contended in the Petition for Certiorari filed by separate petitioner Michael G. Thevis in case No. 73-1075, the arguments of which are incorporated herein by reference as though more fully set out herein, it is respectfully prayed that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

ROBERT EUGENE SMITH, Esq.
2005-100 Colony Square
Atlanta, Georgia 30361
(404)892-8890

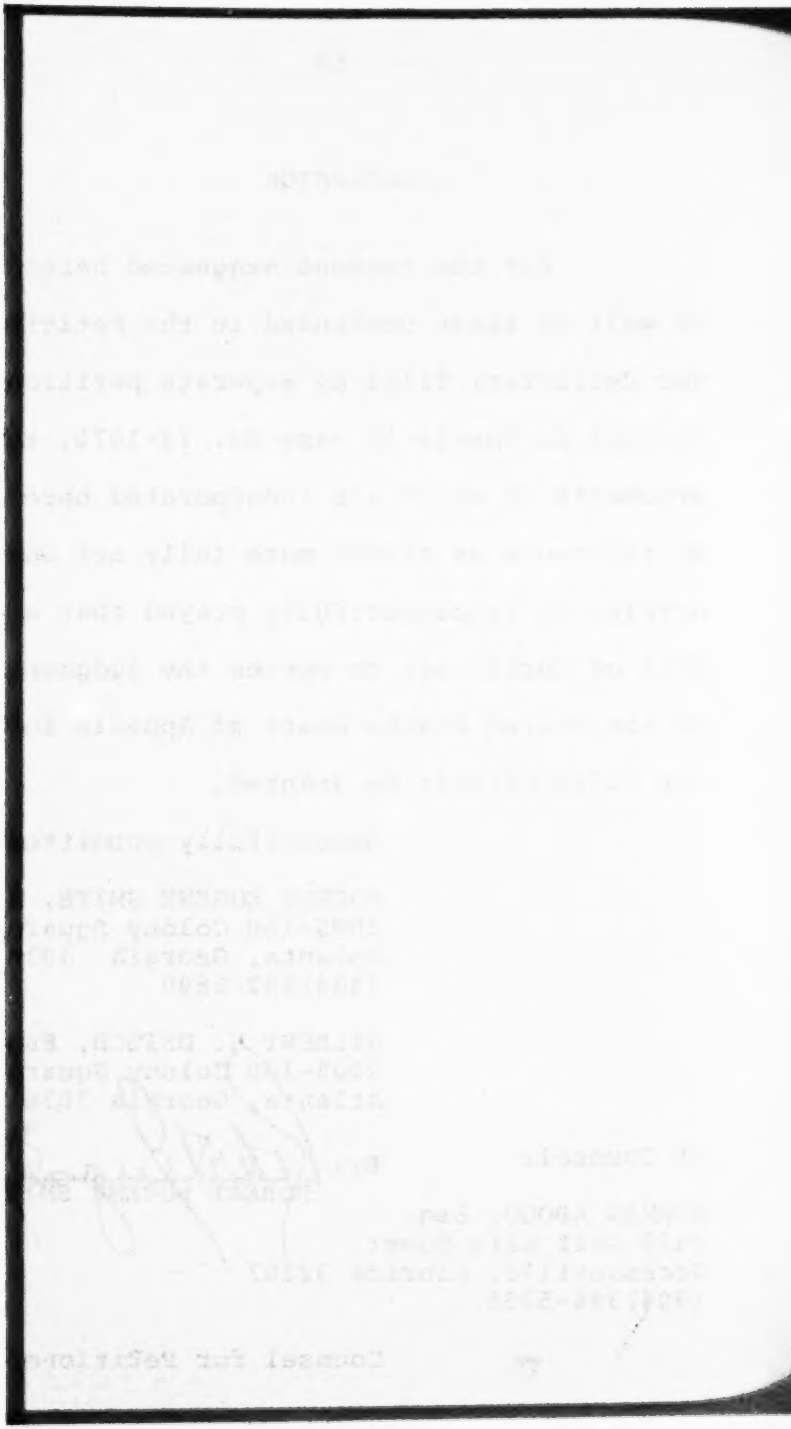
GILBERT H. DEITCH, Esq.
2005-100 Colony Square
Atlanta, Georgia 30361

By: 
ROBERT EUGENE SMITH

Of Counsel:

NORMAN ABOOD, Esq.
2529 Gulf Life Tower
Jacksonville, Florida 32207
(904)396-5355

Counsel for Petitioner



CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the within and foregoing Petition for Writ of Certiorari was served by United States Mail with sufficient postage affixed to ensure delivery to JOHN BRIGGS, Esquire, United States Attorney for the Middle District of Florida and ROBERT KEEFE, Special Attorney with the Department of Justice, Washington, D. C. (three copies).

This 10th day of January, 1974.

ROBERT EUGENE SMITH

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2614

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL G. THEVIS and
PEACHTREE NEWS COMPANY, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

---

(September 12, 1973)

Before BROWN, Chief Judge, BELL and SIMPSON, Circuit Judges.

BELL, Circuit Judge: Appellants Thevis and Peachtree News Company, Inc. were charged in a twelve-count indictment with transporting obscene material by common carrier in interstate commerce, in violation of 18 USCA, § 1462.[1] Jury trial was waived.

---

[1] 18 USCA § 1462 (1966):

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses

The subject matter of each count was a particular magazine and appellants were convicted on each of the counts. The district court found that the material in question, i.e., each magazine, was obscene under the three-pronged test of *Memoirs*.[2] A term of six months imprisonment and five years probation was imposed on Thevis under each count, with the sentences to be served concurrently. In addition, fines were imposed on each defendant with respect to each count. This appeal followed. We affirm with respect to six counts and reverse as to six.

In urging reversal, appellants originally presented five arguments to this court. These were: (1) that the constitutional test for obscenity must focus on whether "pandering" is involved in the distribution of challenged material, and on whether the material is distributed to minors or unwilling adults, cf. *Redrup v. New York*, 1967, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515; (2) that the indictment was unconstitutionally vague in that it merely tracked the statutory language without specifying the elements constituting "obscenity"; (3) that it was necessary for the government to prove that the appellants had transported the magazines knowing

---

any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .

shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense. . . .

[2] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 1966, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1.

that they were obscene in the constitutional sense; (4) that 18 USCA, § 1462 is void for overbreadth in that it reaches transportation of obscene material for private as well as commercial use; and (5) that the prosecution failed to prove by competent evidence that the magazine fell outside the protection of the *Memoirs* standard. We understand appellants' fifth assignment of error to include two distinguishable elements: first, that the prosecution failed to produce sufficient expert testimony; and second, that the evidence, of whatever nature, was insufficient to support the lower court's finding on the issue of obscenity *vel non*. We will treat these two elements as separate assignments of error.

Subsequent to oral argument, the Supreme Court announced five opinions in which a majority of that Court agreed on concrete guidelines to isolate materials depicting or describing "patently offensive 'hard core' sexual conduct" from expression protected by the First Amendment. *Miller v. California*, 1973, ___ U.S. ___, ___ S.Ct. ___, 37 L.Ed 2d 419, 432; *Paris Adult Theatre I v. Slaton*, 1973, ___ U.S. ___, ___ S.Ct. ___, 37 L.Ed.2d 446; *United States v. Orito*, 1973, ___ U.S. ___, ___ S.Ct. ___, 37 L.Ed.2d 513; *Kaplan v. California*, 1973, ___ U.S. ___, ___ S.Ct. ___, 37 L.Ed. 2d 492; *12 200-Ft. Reels of Super 8 mm Film*, 1973, ___ U.S. ___, ___ S.Ct. ___, 37 L.Ed.2d 500.

In light of these opinions, appellant has filed a supplemental brief urging that the *Memoirs* standard can no longer be used for testing obscenity. Further, in this brief it is argued that the *Miller* standard is also inapplicable, for two reasons: (1) that application of

the new standard would be violative of the Ex Post Facto clause of Article I, § 9, United States Constitution; and (2) that in any case the material in question would be protected under *Miller* because 18 USCA, § 1462, as written or authoritatively construed, does not specifically define that sexual conduct whose depiction or description is thereby regulated. In essence, appellants are contending, on the authority of *Miller*, that the Supreme Court has eliminated all obscenity laws that would have been otherwise applicable to transactions occurring prior to June 21, 1973, and that the Court has also eliminated all laws controlling obscenity after that date, save as legislatures enact or courts construe statutes to meet the *Miller* requirements. In sum, claim the appellants, we are without power to test the materials for obscenity under any standard. We reject this broad contention. We do not perceive that the Supreme Court, either deliberately or unwittingly, has stripped the nation of laws against obscenity in any such manner.

For reasons to be discussed in Part II of this opinion, we hold that the twelve magazines are to be tested for obscenity under both standards, with the appellants in every instance to receive the benefit of the most favorable standard. We reserve the issue of obscenity *vel non*, under both standards, for Part III. In Part I we shall consider appellants' first five original assignments of error.

I.

Appellants' first assignment of error is that the materials in question should not be tested under a stand-

ard as restrictive of pornography[3] as *Memoirs*. Rather they urge a standard arguably suggested in *Redrup v. New York*, supra, requiring for a finding of obscenity that the materials be distributed to non-consenting adults, to juveniles, or generally in a "pandering" manner. We consider this argument to have been completely foreclosed by the Supreme Court's statement, in *Miller*, that the *Memoirs* standard was correctly viewed as the limit on state prosecution prior to *Miller*. ____ U.S. at ____, 37 L.Ed.2d at 435. We also find entirely spurious the argument that there was such a marked departure in *Redrup* from the basic assumption of *Memoirs*, that the nature of the material and not the manner of its distribution is determinative of obscenity. In the *Redrup* per curiam opinion, the Court specifically declined to consider the effect of the characteristics of the method of distributing pornographic materials. Finally, we note that the origin of the "pandering" concept is *Ginzburg v. United States*, 1966, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, and that pandering in that case was specifically treated merely as an indicator of whether the material itself appealed to prurient interests and was utterly without redeeming social value. See *Ginzburg*, 383 U.S. at 467-76.

---

[3]"Pornography" derives from the Greek (*porne'*, harlot, and *graphos*, writing). It now means "1: a description of prostitutes or prostitution. 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Webster's New International Dictionary (Unabridged, 3d Ed., 1969). Whether or not the material in question is obscene, it is pornography. This latter term connotes no legal conclusions or consequences.

Appellants' second argument is that the indictment, which tracked the wording of 18 USCA, § 1462, must be dismissed for failure to specify the elements of obscenity. We do not agree. The general rule, stated by this court, is that:

> "An indictment which follows the language of the statute is ordinarily sufficient unless the statute omits an essential element of the offense."

United States v. Farabee, 5 Cir., 1969, 411 F.2d 1210, 1211; *Downing v. United States*, 5 Cir., 1965, 348 F.2d 594, 599. See also *Esperti v. United States*, 5 Cir., 1969, 406 F.2d 148; *Bland v. United States*, 5 Cir., 1962, 299 F.2d 105. The statute here does not omit any essential element of the offense for which appellants have been convicted. The term "obscene" as used in the statute is a legal term of art, not merely a generic or descriptive term. The term has been the subject of much explication in Supreme Court opinions, and in particular has been defined in *Roth*[4] and *Memoirs*. Further, in *Roth* the Court held that the words used in 18 USCA, § 1462 are sufficiently precise to avoid the due process vice of vagueness.[5]

Appellants' third contention deals with the scienter necessary for conviction under 18 USCA, § 1462. Ap-

---

[4]*Roth v. United States*, 1957, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

[5]The sufficiency of an indictment tracking the words of 18 USCA, § 1462 was challenged in *United States v. Luros*, N.D. Iowa, 1965, 243 F.Supp. 160, *rev'd on other grounds*, 8 Cir., 1968, 389 F.2d 200. That court reached a conclusion identical to ours. *Id.* at 166-67.

pellants claim that it is necessary for the government to prove not merely knowledge of the nature of the materials placed in interstate commerce, but also to prove that appellants were aware that the materials were legally obscene.

Appellants base this argument on *Smith v. California*, 1959, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205. In *Smith*, the Supreme Court reversed the conviction of a book store proprietor under an ordinance that imposed absolute criminal liability on any party possessing obscene matter for sale. The Court held that scienter, of some nature, was a necessary element where First Amendment Rights were concerned. However, the Court pointedly did not pass on the nature of the requisite mental element. Apparently the Court did not disturb its holding in *Rosen v. United States*, 1896. 161 U.S. 29, 40 L.Ed. 606, that knowledge or notice of the contents of obscene material is sufficient and that it need not be shown that the material was, in the opinion of the accused, legally obscene. A number of lower courts have followed *Rosen* in recent years: *United States v. West Coast News Company*, 6 Cir., 1956, 357 F.2d 855, *rev'd on other grounds, Aday v. United States*, 1967, 388 U.S. 447, 87 S.Ct. 2095, 18 L.Ed.2d 1309; *Schindler v. United States*, 9 Cir., 1953, 208 F.2d 289. See also *Kahm v. United States*, 5 Cir., 1962, 300 F.2d 78. We hold that the government, by proving that the appellants knew the nature of the materials they put in interstate commerce, has met its burden of proving scienter.

The appellants' fourth contention is that the statute under which they have been prosecuted is overbroad

because it fails to distinguish between transportation of obscene materials for private use and that for commercial distribution. This argument arises from *Stanley v. Georgia*, 1969, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542, which established that individuals may possess obscene materials in the privacy of their own homes; and it assumes that there is a correlative right to transport and receive such material for private use. Whatever validity, if any, this reasoning may ever have had was badly eroded by *United States v. Thirty-Seven Photographs*, 1971, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822, and *United States v. Reidel*, 1971, 402 U.S. 351, 91 S.Ct. 1400, 28 L.Ed.2d 813. The argument has now been absolutely foreclosed by *United States v. Orito*, supra. In *Orito* the Court ruled against a defendant who made precisely the same claim raised here.

The first element of appellants' fifth contention is that their conviction is precluded by the government's failure to use sufficient expert testimony on the issues of prurient appeal, community standards, and redeeming social value. We held in *United States v. Groner*, 1973, ____ F.2d ____ (En banc) [No. 71-1091, Slip Opinion dated May 22, 1973], that expert testimony on the part of the prosecution is not necessary in cases where the materials themselves are available for inspection by the finder of fact. That we were correct in this opinion was made clear in *Paris Adult Theatre I v. Slaton*, supra, ____ U.S. at ____, 37 L.Ed.2d at 456. See also *Kaplan v. California*, supra, ____ U.S. at ____, 37 L.Ed.2d at 498.

II.

We now turn to the issues raised in appellants' supplemental brief, dealing with whether *Miller* precludes testing for obscenity under any standard.

In *Miller* the Court states that the constitutional test for obscenity is whether:

> "(a) [T]he average person, applying 'contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest," (citations omitted)
>
> "(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and
>
> "(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

In *Orito*, supra, and *12 200-Ft. Reels*, supra, the Court made clear that this standard also applies to prosecutions under federal statutes. It might be noted that *Miller* relaxes the government's burden by eliminating the *Memoirs* requirement that the material be proven "utterly without redeeming social value", and by the Court's clarification that "community standards" does not refer to a nationwide community. On the other hand, in order carefully to limit regulation of pornographic materials, so as to avoid First Amendment

incursions, the *Miller* standard requires that regulatory statutes define specific sexual conduct to whose depiction or description they apply. However, the Court makes clear that the statutory requirement can be satisfied by a judicial gloss, and that statutes as broad as 18 USCA, § 1462 are subject to such construction. See *12 200-Ft. Reels*, supra, fn. 7 (discussed and quoted at p. 13 infra).

Having thus stated the standards governing control of pornography, and having also resolved other points of uncertainty,[6] the Supreme Court in each case, and in some 60 other cases dealt with summarily or by per curiam decision on July 25, 1973, vacated the judgments and remanded for further proceedings not inconsistent with the *Miller* series of opinions.

Appellants would have us conclude that the Court's wholesale vacation and remand of obscenity cases, and especially that of *Kaplan v. California*, supra, (in which the Court agreed that the material was obscene under the *Memoirs* standard), established that the *Memoirs* standard could not have been used as a basis for conviction in pending cases.

We decline to read so much into *Miller*. Rather, we conclude that by indiscriminately vacating and remanding these cases, the Supreme Court declared that all obscenity cases which had not reached final adjudication should be re-examined in light of its clarification of previous standards and its declaration of

---

[6]Some of the auxiliary rulings were noted above when this court dealt with various of the appellants' original arguments for reversal. See Part I of this opinion.

new standards. We do not read this as precluding our application of the *Memoirs* standard to materials involved in transactions occurring in 1970. We base this conclusion on several observations. For one, we note that the Supreme Court in *Miller* stated specifically that *Memoirs* was "correctly regarded at the time of trial as limiting state prosecution under controlling case law." ___ U.S. at ___, 37 L.Ed.2d at 435.

Further, at no point did the Court indicate that *Miller's* clarification and modification of *Memoirs* was the result of *Memoirs* permitting unconstitutional infringement on efforts to distribute pornography. Rather, the Court was dissatisfied with *Memoirs* because it imposed greater burdens on the regulation of such materials than was demanded by the Constitution. Thus the Court criticized the "utterly without redeeming social value" requirement as being a "burden virtually impossible to discharge under our criminal standards of proof." *Miller*, ___ U.S. at ___, 37 L.Ed. 2d at 429, and it stated that "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City". *Id.*, at ___, 37 L.Ed.2d at 435. We are unable to conclude from the Court's wholesale remand of these cases, without more, that the Court, concerned as it was for strengthening the power to regulate pornography, chose gratuitously to eliminate constitutionally-valid law that would otherwise be available in prosecuting pending obscenity cases.

However, we do believe it to be our duty, under the *Miller* remands and in view of the care with which

the judiciary must protect First Amendment rights, to assure that no one is convicted under earlier extant standards if they are more restrictive of pornography than those in *Miller*. Thus when we make, as we are required to do, an "independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected", *Jacobellis v. Ohio*, 1964, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793; *United States v. Groner*, 5 Cir., 1973, supra, we shall consider both the *Miller* and *Memoirs* definitions of obscenity. Any count based on a magazine which is not obscene under both of these standards is due to be dismissed.

Our dual test approach is out of an abundance of caution based on the surmise that the Supreme Court, by vacating and remanding the entire group of obscenity cases, indicated that defendants in pending prosecutions were entitled to the benefit, if any, of the new standards. That our decision in this case must so accommodate the new standard is made evident by *Miller v. United States*, 1973, ___ U.S. ___, ___ S.Ct. ___, 37 L.Ed.2d 1022. There the Court vacated and remanded a federal conviction for reconsideration in light of the *Miller* series of opinions. The federal conviction was under the *Memoirs* standard and the very statute here involved, and against a defendant who raised on appeal contentions similar to those made by the appellants here. See *Miller v. United States*, 9 Cir., 1970, 431 F.2d 655.

Therefore, before we consider the question of obscenity *vel non*, and because we do apply the *Miller* standard, we must address ourselves to the question wheth-

er 18 USCA, § 1462 can satisfy the *Miller* requirement that the applicable statute specifically define sexual conduct whose depiction or description is thereby restricted. This assumes, of course, that the Supreme Court intended for appellants to have the benefit of the *Miller* standard.[7]

The statute under which the appellants were indicted proscribes interstate transportation of "obscene, lewd, lascivious, or filthy" materials. On its face, this statutory terminology does not contain the specifics required by *Miller*. The same, of course, might have been said of the statute while *Memoirs* controlled the definition of obscenity. The difference is that *Miller* requires that elements of the definition be a part of the statute. This requirement may be met, however, according to *Miller*, by authoritative judicial construction. Further, in *12 200-Ft. Reels*, supra, at fn. 7, the Court states that it is "prepared to construe such [federal statutory] terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples in *Miller*. . . ."[8] We believe that this answers the question and that the definition of *Miller* is a gloss properly added to § 1462. The effect is to substitute

---

[7]We do not assume, given ex post facto considerations, that the Supreme Court intended to impose any detriment ensuing from the *Miller* standards on appellants.

[8]These examples are:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretary functions, and lewd exhibitions of the genitals."

Miller, ——— U.S. at ———, 37 L.Ed.2d at 431.

the *Miller* definition of "obscene" for the *Memoirs* definition. On this basis we proceed to an examination of the materials which underlie the indictment.

III.

In making our independent constitutional judgment under *Jacobellis v. Ohio*, supra, as to whether the materials in question are constitutionally protected, we have inspected the magazines in question and have applied both the *Memoirs* and *Miller* standards. Our conclusions on each element of both tests as to each magazine are contained in Table I.

TABLE I

	Memoirs			*Miller*		
	(a)	*(b)*	*(c)*	*(a)*	*(b)*	*(c)*
Magazine Titles	*Dominant theme, taken as a whole, appeals to a prurient interest in sex*	*Patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters*	*Utterly without redeeming social value*	*The average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest*	*Patently offensive depiction or description of sexual conduct specifically defined by applicable statute*	*Taken as a whole, lacks serious literary, artistic, political or scientific value*
Boys and Their Male Lovers	Yes	Yes	No	Yes	Yes	Yes
Duo	Yes	Yes	Yes	Yes	Yes	Yes
Domino	Yes	Yes	Yes	Yes	Yes	Yes
Love Knot	Yes	Yes	Yes	Yes	Yes	Yes
Wanton	Yes	Yes	Yes	Yes	Yes	Yes
My Boys	Yes	Yes	Yes	Yes	Yes	Yes
In & Its Nice	Yes	Yes	Yes	Yes	Yes	Yes
Girlfriends	Yes	Yes	No	Yes	Yes	Yes
Pussy Willow	Yes	Yes	No	Yes	Yes	Yes
Arcadia	Yes	Yes	No	Yes	Yes	Yes
Teenage Jaybirds	Yes	Yes	No	Yes	Yes	Yes
Cloud 9	Yes	Yes	No	Yes	Yes	Yes

In summary, we have concluded that all of the magazines are obscene under *Miller*, but that six are protected by the *Memoirs* requirement that they be utterly without redeeming social value. We have distinguished these six from the remainder on the basis of their significant content of literary matter, including short stories of at least arguable merit as well as discussions of lesbianism, homosexuality, nudity, censorship, photography, marital sexual problems, and the nude in fine art. The inclusion of this literary matter in significant proportions precludes a finding, in our judgment, that the six magazines are "utterly without redeeming social value." The issue as to these six is close, due to the numerous pornographic pictures included with the literary matter. Indeed, the pictures in each instance are the principle content of the magazines and would, standing along, be found obscene.

Since we have ruled that appellants are to receive any protection provided by either applicable standard, their convictions on the six counts based on magazines we find to be protected by *Memoirs* must be reversed. The judgment of conviction as to the other six counts is affirmed.

AFFIRMED in part; REVERSED in part.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2614

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL G. THEVIS and
PEACHTREE NEWS COMPANY, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion Sept. 12, 1973, 5 Cir., 1973, ____ F.2d ____).

(November 15, 1973)

Before BROWN, Chief Judge, BELL and SIMPSON, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in

regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure: Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v.

No. 70-72 -Cr-J
(18 USC 1462)

MICHAEL G. THEVIS
PEACHTREE NEWS COMPANY, INC.,
a Georgia corporation

The Grand Jury charges:

COUNT ONE

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 38 copies of magazines entitled "Duo" from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT TWO

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Boys and Their Male Lovers" from Atlanta,

State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT THREE

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 20 copies of magazines entitled "Domino", Volume 1, Number 1, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT FOUR

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 5 copies of magazines entitled "Love Knot" from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT FIVE

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and

PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 5 copies of magazines entitled "Wanton" from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT SIX

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 110 copies of magazines entitled "My Boys", Volume 1, Number 1, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT SEVEN

That on or about the 24th day of April, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 5 copies of magazines entitled "In and Its Nice" from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville

Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT EIGHT

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: more than 6 copies of magazines entitled "The Girlfriends", Volume 2, Number 2, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT NINE

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Pussy Willow" from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT TEN

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and

PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Arcadia", Volume 6, Number 2, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT ELEVEN

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Teenage Jaybird", Volume 1, Number 4, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT TWELVE

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Cloud 9", Volume 6, Number 3, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street,

PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Arcadia", Volume 6, Number 2, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT ELEVEN

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Teenage Jaybird", Volume 1, Number 4, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street, Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

COUNT TWELVE

That on or about the 6th day of May, 1970, in the Middle District of Florida, defendants, MICHAEL G. THEVIS and PEACHTREE NEWS COMPANY, INC., a Georgia corporation, did unlawfully, wilfully and knowingly cause a common carrier to be used for the carriage in interstate commerce of obscene, lewd, lascivious and filthy writings or prints, to wit: 10 copies of magazines entitled "Cloud 9", Volume 6, Number 3, from Atlanta, State of Georgia, to Springfield News Company, 1705 Main Street,

Jacksonville, Florida, in the Middle District of Florida; in violation of Title 18, United States Code, Section 1462.

A TRUE BILL

Robert F. Wyse Jr. Dorough Jr.
FOREMAN

John L. Briggs
JOHN L. BRIGGS
United States Attorney